IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES	)	
v.	)	**CRIMINAL NO. 4:15-cr-00300-BRW**
THEODORE E. SUHL	)	

REPLY IN SUPPORT OF THEODORE SUHL'S MOTION FOR RELEASE PENDING APPEAL

This Court indicated at sentencing that Ted Suhl is not "likely to flee or pose a danger to the safety of any other person or the community,"[1] and the government does not contest that element. As to the second element, the government does not claim the motion is a delaying tactic or contest that a new trial on all counts is likely if the Eighth Circuit agrees the bribery instructions were erroneous or on the wire fraud counts if the Eighth Circuit agrees with Suhl's *McDonnell* arguments.[2] Rather, the government opposes release primarily based on arguments that the four appellate issues emphasized in Suhl's motion do not present substantial questions. Yet the government's vigorous disagreement on the merits only highlights how close these questions are. To avoid the potential and irremediable injustice of imprisoning Suhl for convictions that may be reversed on substantial appellate grounds, this Court should grant Suhl release pending appeal.

A. Whether the Wire Fraud and Bribery Jury Instructions Omitted the *Quid Pro Quo* Requirement Is a Close Question

The government effectively concedes that (1) both Sections 1343 and 666 require a *quid pro quo* to convict for bribery and (2) the omission of this requirement from the jury instructions

[1] Sentencing Tr. at 46–47.

[2] *See* ECF No. 149, at 3–5, 7 (Government's Opp.).

in Suhl's case would likely result in a new trial.[3] Thus, to oppose Suhl's motion for release pending appeal, the government is left to argue only that it is not even a close question whether the instructions failed to require a *quid pro quo* by omitting the "in exchange" language included in the model instructions and proposed by both the defense and the government. The government's effort is not persuasive because the instructions allowed the jury to convict Suhl for bribery without finding his payments were "in exchange for" anything, much less official acts.[4]

First, the government asserts that the use of "exchange" twice in the instructions was sufficient.[5] But both uses were permissive, not mandatory. The option that the jury "may" convict based on "a 'stream of benefits' offered or paid in exchange for some official action" was just that: an option.[6] So too the option that the jury "may consider all the evidence . . . to determine whether Mr. Suhl intended or solicited an exchange of money for official acts," because the jury was only required to find "Suhl gave something of value with intent to influence an official act."[7] These options allowed the jury to convict even if they did not find beyond a reasonable doubt that Suhl intended a *quid pro quo*. For example, the jury could convict if it found that Suhl hoped, when he wrote a check, that Steven Jones would take some specific action even if Suhl did not intend to exchange his check for that action. The jury could convict even if it believed Suhl was merely trying to build general goodwill, which is not a crime.[8]

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[3] *See id.* at 3–5.

[4] *See, e.g.*, *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404–05 (1999) ("[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value in exchange for an official act." (emphasis in original)).

[5] ECF No. 149, at 3.

[6] ECF No. 123, at 18 (Jury Instructions) (emphasis added); *see* ECF No. 149, at 3.

[7] ECF No. 123, at 20 (emphasis added).

[8] *Sun-Diamond*, 526 U.S. at 405–07.

Second, the government argues the instructions required the jury to find a *quid pro quo* because of language regarding Suhl's "intent that Mr. Jones . . . would take official actions," "intent to induce the performance of an official act," "intent that Mr. Jones take official action or an official act," "intent to influence an official act," and "intent to influence."[9] This argument misses the mark. For starters, the "intent to induce" instruction, like two "exchange" instructions, was an option rather than a requirement: it allowed the jury to convict on counts two and four even if the jury did not believe "Jones had the power to, intended to, or did perform the official acts."[10] But the jury was free to disregard this option if it believed Jones had that power.

More importantly, all of these instructions failed to require a *quid pro quo*.[11] Bribery requires not just general "intent to influence" or "intent to induce" but specific and corrupt intent to influence or induce.[12] Corrupt, in this context, at minimum means there was a *quid pro quo*—that the payment was made with intent to influence official action in exchange for the payment.[13] Without this limit, bribery laws would raise even graver "constitutional concerns" than were present in *McDonnell*, where the government did not contest the "exchange" requirement and the jury instructions clearly required an agreement "to accept a thing of value in exchange for official

[9] ECF No. 123, at 17, 18, 20, 21; *see* ECF No. 149, at 4–5.

[10] ECF No. 123, at 18.

[11] Suhl may not be "entitled to a particularly worded instruction," *United States v. Wright*, 246 F.3d 1123, 1128 (8th Cir. 2001) (internal quotation omitted), but the court's chosen words may not omit an element of the offense or a legal defense, *United States v. Bruguier*, 735 F.3d 754, 757, 763 (8th Cir. 2013) (en banc). Here, the honest services fraud instructions failed to require either an "exchange" or a "corrupt purpose," and the § 666 bribery instructions eviscerated the meaning of "corruptly" by defining it without a *quid pro quo*. *See* ECF No. 123, at 17–21.

[12] *Sun-Diamond*, 526 U.S. at 404 (explaining that "as to the giver," "bribery . . . requires a showing that something of value was corruptly given, offered, or promised to a public official . . . with intent . . . 'to influence any official act'" (emphasis added)); *id.* at 404–05 (requiring "a specific intent to give . . . something of value in exchange for an official act" (first emphasis added)).

[13] *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016).

action."[14] Wide swaths of activity essential to a robust democracy would be chilled or criminalized. Virtually all forms of lobbying would be at risk. The threat of prosecution would invade traditional exchanges between bench, bar, and academy. No longer could a law school pay for out-of-town judges to fly in and judge the moot court, lest the dean's hope that the judges be impressed enough with her students to hire some as clerks transform the payment into a bribe.

The government's argument that, contrary to *McDonnell* and *Sun-Diamond*, mere intent to influence is enough rests on misreadings of the cited cases. Notably, the government asserts that the defense's reliance on *United States v. Jennings*[15]—a Fourth Circuit case that singlehandedly demonstrates this issue is close—"ignores a more recent case from that same circuit" supporting the government.[16] But that "more recent case," *United States v. Jefferson*, actually supports the defense's interpretation of the instructions required for bribery.[17] The *Jefferson* trial court instructed the jury that to convict it had to "find that the government has established beyond a reasonable doubt that the defendant agreed to accept things of value in exchange for performing official acts."[18] On appeal, the Fourth Circuit adhered to *Jennings*, explaining "an act of bribery requires the giving of something of value in exchange for an official act."[19]

The government also errs in its portrayal of *United States v. Whitfield*.[20] Not only does the government silently omit the *Whitfield* court's original emphasis on the key jury instruction

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[14] *Id.* at 2366, 2372 (emphasis added) (internal quotation omitted).

[15] 160 F.3d 1006 (4th Cir. 1998).

[16] ECF No. 149, at 5.

[17] 674 F.3d 332 (4th Cir. 2012), *as amended* (Mar. 29, 2012).

[18] *Id.* at 358 (emphasis added); *see also id.* at 339 n.7.

[19] *Id.* at 353 (emphasis added); *see also id.* at 359 (quoting *United States v. Quinn*, 359 F.3d 666, 673 (4th Cir. 2004) (quoting *Jennings*, 160 F.3d at 1014)).

[20] 590 F.3d 325 (5th Cir. 2009); *see* ECF No. 149, at 5 n.2.

communicating the *quid pro quo* requirement—"a corrupt agreement . . ."[21]—the government omits the *Whitfield* court's broader analysis, which is directly contrary to the government's position on this issue.[22] After emphasizing that the jury instructions required a "corrupt agreement," the *Whitfield* court explained that the government's obligation to "prove the 'specific intent to give or receive something of value in exchange for an official act' . . . . was satisfied by the portion of the jury charge requiring the Government to prove that appellants entered into a 'corrupt agreement' and that the [officials' actions] were based upon 'a corrupt purpose.'"[23] "Under the undisputed facts [in *Whitfield*], the jury's finding that there was a corrupt agreement necessarily entailed a finding of an exchange of things of value for [official acts]."[24]

While the other two cases cited by the government also support Suhl,[25] the issue before this Court is not whether the Eighth Circuit is likely to agree with Suhl on the merits.[26] For present purposes, the key point is that this issue is close, as demonstrated by the many appellate decisions agreeing with Suhl's position,[27] and would result in a new trial if resolved in Suhl's favor.

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[21] 590 F.3d at 353 (emphasis in original).

[22] ECF No. 149, at 5 n.2.

[23] 590 F.3d at 353.

[24] *Id.* (emphasis in original).

[25] Contrary to the government's assertion, the instruction found sufficient in *United States v. Alfisi* clearly communicated the *quid pro quo* requirement by requiring the jury to find the payment was given "for or because of an official act [and] with a corrupt intention specifically to influence the outcome of the official act," 308 F.3d 144, 150 (2d Cir. 2002) (alteration in original) (emphasis added). Similarly, the pre-*Sun-Diamond* instruction approved in *United States v. Tomblin* required the jury to find the payment was given "corruptly," 46 F.3d 1369, 1379 n.17 (5th Cir. 1995).

[26] *United States v. Powell*, 761 F.2d 1227, 1234 (8th Cir. 1985) (en banc).

[27] In addition to *Jennings*, *Jefferson*, and *Whitfield*, see for example *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980) ("[T]he government must show that the money was knowingly offered to an official with the intent and expectation that, in exchange for the money, some act of a public official would be influenced. . . . . The money must be offered, in other words, with the intent and design to influence official action in exchange for the donation." (emphasis added)).

B. Whether *McDonnell* Compels Dismissal of the Indictment or a Finding of Constructive Amendment Are Close Questions that, If Resolved in Suhl's Favor, Would Require Reversal or a New Trial

The government initially contends that success on Suhl's *McDonnell* arguments would "not affect his sentence on counts five and six."[28] The government is doubly wrong. First, the government ignores the Eighth Circuit's well-established "sentencing package" doctrine, which holds that reversing a conviction forming part of a concurrent "multi-count sentence" requires vacatur of the entire sentence.[29] Second, Suhl argued in his new trial motion and intends to argue on appeal that *McDonnell*'s definition of "official act" "applies in equal measure to § 666."[30] Thus, success on his *McDonnell* arguments would require reversal or a new trial on counts five and six as well as two and four. Moreover, how *McDonnell* applies to § 666 is a close question, and the Eighth Circuit in this case is likely to be among the first appeals courts to consider its impact. The Eighth Circuit's previous recognition that § 666 "prohibits . . . the acceptance of bribes . . . intended to be a bonus for taking official action"[31] and the government's position in other cases that the "official act" requirement applies to § 666[32] further demonstrate that the omission of any official act requirement from the § 666 jury instructions is a substantial appellate issue.

Next, the government responds to Suhl's argument that the Indictment itself failed to allege a crime in light of *McDonnell* (because it merely alleged that Jones "agreed to look into" issues) by arguing the jury instructions correctly tracked *McDonnell*.[33] This clever attempt to shift the

[28] ECF No. 149, at 7.

[29] *Bruguier*, 735 F.3d at 764 (internal quotation omitted).

[30] ECF No. 132-1, at 20 (Brief ISO Motion for a New Trial).

[31] *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007) (emphasis added).

[32] *See, e.g.*, Ex. H (*United States v. Dean Skelos*, No. 15-cr-317 (S.D.N.Y. Dec. 5, 2015), ECF No. 110-1) at 37, 41.

[33] ECF No. 149, at 7.

focus to the jury instructions does not hide the fact that the real issue—the Indictment's validity—is a close question. The Fifth Amendment protects a defendant from conviction "on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."[34] Thus, after the Supreme Court handed down *McNally v. United States*,[35] convictions across the country had to be vacated, regardless of the jury instructions used to convict, because the convictions were based on indictments which no longer alleged crimes.[36] The Supreme Court's decision in *McDonnell* is a landmark decision akin to *McNally*. Here, as with the convictions vacated after *McNally*, "[i]t is too late now for the government to claim that its indictment was returned by a grand jury cognizant of and acting in accordance with the new teachings of the Supreme Court."[37]

Finally, the government contends Suhl's constructive amendment argument does not present a close question because "the jury instructions were consistent with the statutory elements alleged in the indictment."[38] The government misses the point. The holding of *United States v. Narog*[39] is that if an indictment charges particular facts as part of the crime rather than merely using "the general language of the statute," it is constructive amendment to allow the government to retreat from those facts at trial.[40] Here, the Indictment charged Suhl with entering into a bribery agreement with Jones to "look into" various issues.[41] After *McDonnell* established looking into

[34] *Russell v. United States*, 369 U.S. 749, 770 (1962).

[35] 483 U.S. 350 (1987).

[36] *E.g.*, *United States v. Davis*, 873 F.2d 900, 901–03 (6th Cir. 1989); *United States v. Italiano*, 837 F.2d 1480, 1484, 1486–88 (11th Cir. 1988); *see Russell*, 369 U.S. at 770–71.

[37] *Italiano*, 837 F.2d at 1488.

[38] ECF No. 149, at 8 (emphasis added).

[39] 372 F.3d 1243 (11th Cir. 2004).

[40] *Id.* at 1248–50.

[41] ECF No. 1, at 4–5 ¶ 12(c), (f) (Indictment).

issues is not an official act and the government's evidentiary support for any agreement collapsed, the government shifted theories at trial.[42] Whether that shift amounted to a constructive amendment is a close question that would result in reversal if Suhl prevails.[43]

C. Whether Various Evidentiary Rulings Warrant a New Trial is a Close Question

The crux of the government's response to Suhl's evidentiary appeal issues is that its case was so strong, so "unimpeachable," that it was "harmless" to deny Suhl his constitutional rights to effectively cross-examine Phillip Carter and to mount an effective defense.[44] The jury's verdicts and questions prove otherwise. First, reading the government's glowing account of its own case, one would be surprised to learn the jury actually acquitted Suhl of two counts—including conspiracy—and certainly did not convict him of paying "numerous" bribes.[45] In reality, the convictions depended on Carter because he was the only government witness to explain away key ambiguities and inconsistencies in the government's evidence. The fact that the government gave Carter a pass on many crimes having nothing to do with Suhl and offered Carter a fifty-percent sentence reduction on his voter fraud sentence in exchange for his cooperation would have powerfully impeached his credibility. This Confrontation Clause issue is substantial and would require a new trial if decided in Suhl's favor.[46]

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[42] *See, e.g.*, Trial Tr. at 466–67.

[43] *See Narog*, 372 F.3d at 1250.

[44] ECF No. 149, at 12–15.

[45] *Id.* at 1, 13.

[46] Contrary to the government's claim that "the defense never sought to elicit from Carter the number of charges that he potentially faced," ECF No. 149, at 11, this issue is fully preserved. The defense sought to ask Carter "whether he had engaged in voter fraud 14 or 15 times, but was not charged in return for his cooperation . . . ." ECF No. 109, at 1. And the defense sought to question Carter and Special Agent Phillip Spainhour, about the pass Carter received on these and other crimes. *See, e.g.*, Trial Tr. at 184–88, 349–352; ECF No. 108 (Offer of Proof), at 1–7.

Second, questions from the jurors reveal that several evidentiary rulings crippled Suhl's defense. During the government's case-in-chief, two jurors independently asked whether a document the government claimed Suhl illicitly sought to obtain from Jones was publicly available under the Arkansas Freedom of Information Act (FOIA).[47] To answer this proper question, Suhl sought to call the leading expert on Arkansas FOIA practices and procedures to testify that this supposedly secret document was publicly available for free to Suhl or any other Arkansan.[48] Suhl also sought to present evidence of his charitable giving to Christian causes other than the 15th Street Church. During deliberations, the jury sent a question about this very issue.[49] After convincing this Court to exclude both Suhl's expert witness and the evidence of his charity to other Christian causes, the government argued to the jury in closing that Suhl bribed Jones for the document and that Suhl did not give away money without getting something in return.[50] Whether this Court's rulings on these issues denied Suhl his fundamental constitutional right to "present witnesses in his own defense"[51] is a close question that, if decided in Suhl's favor, would likely result in a new trial.[52]

CONCLUSION

For the reasons discussed above and in his opening brief, Suhl respectfully asks this Court to grant his motion for release pending appeal.

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[47] A.C.A. §§ 25-19-101 to 110; *see* Trial Tr. at 594–95; ECF No. 122 at 1–2.

[48] ECF No. 132-1, at 28–33; Trial Tr. at 810–13.

[49] ECF No. 122, at 3.

[50] Trial Tr. at 909, 914, 950-51.

[51] *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see also, e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987); *Crane v. Kentucky*, 476 U.S. 683, 690–91 (1986).

[52] *See United States v. Turning Bear*, 357 F.3d 730, 740–42 (8th Cir. 2004) (evidentiary rulings were not harmless because the government's evidence "was not 'overwhelming'").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notifications of such filing to the following:

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